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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DEVON CHRISTOPHER WENGER,

Defendant.

Case No.: 4:23-CR-00269-JSW-3

(Hon. Jeffrey S. White)

**DEFENDANT WENGER'S NOTICE  
OF MOTION AND MOTION TO  
SUPPRESS THE FBI WARRANT  
DATED JULY 24, 2023 & NOTICE  
OF MOTION AND MOTION FOR  
HEARING PURSUANT TO  
*FRANKS V. DELAWARE*;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

**Date: September 17, 2024**

**Time: 1:00 PM**

**Room: 5**

\\

1       **PLEASE TAKE NOTICE** that on September 17, 2024 at 1:00 p.m. or as  
2 soon as the matter may be heard before the Honorable Jeffrey S. White, defendant  
3 Devon Christopher Wenger, by and through counsel of record will move for a  
4 motion to suppress evidence seized pursuant to the July 24, 2023 search warrant  
5 and a Franks hearing regarding the statements made in the July 24, 2023 search  
6 warrant.

7  
8  
9 Dated: August 13, 2024

SEKI, NISHIMURA & WATASE, PLC

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11  
12 By: /s/ Nicole Castronovo  
13 NICOLE CASTRONOVO  
14 Attorney for Defendant  
15 Devon Christopher Wenger  
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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Defendant DEVON CHRISTOPHER WENGER (“Wenger”) has been charged in Count One of the Indictment with 18 U.S.C. § 241 – Conspiracy Against Rights, and in Count Eight with 18 U.S.C. § 241 – Deprivation of Rights Under Color of Law. The government seeks to introduce records from cellular telephones, including text messages and other electronic evidence, obtained through multiple search warrants.

In this case, Defense counsel has already filed two motions challenging the veracity and validity of a federal warrant signed on May 19, 2023, (hereafter “federal warrant #1”) and a state warrant signed on March 22, 2022 (hereafter “state warrant #1”).

The Court previously ordered the government to turn over all discovery to Defense counsel prior to the law and motion deadline set by the Court. After the deadline, the government produced a litany of new discovery. This included a federal search warrant signed on July 24, 2023. (Exhibit 1; DCW-000506).

This Court gave leave to Defense counsel to file additional law and motion related to the warrant signed July 24, 2023 (hereafter “federal warrant #2”). When setting this new deadline, the Court asked Defense counsel to not reinvent the wheel. As such Defense counsel will not restate all the previously cited law but will refer to the previously filed motions instead with pin cites.

### **II. STATEMENT OF FACTS**

#### **A. The Government Has Already Conceded the July 24, 2023 Warrant is Problematic**

During the July 30, 2024, hearing on the Motion to Suppress and the

1 Franks' Hearing regarding state court warrant #1, and federal warrant #1, the  
2 government conceded it will not use direct or derivative evidence from federal  
3 warrant #1 or the July 23, 2023, warrant:

4  
5 THE COURT: Well, why wasn't -- why wasn't that -- why  
6 was that not produced to the Court -- because I'd like to know  
7 if there's any evidence derived from the second warrant that  
8 the government plans to introduce from the second warrant.

9 MR. KRISHNAMURTHY: The answer is no. **We don't intend to**  
10 **introduce any evidence from the first or second warrant, or**  
11 **derivative evidence from either of the two warrants.**

12 THE COURT: Why wasn't -- just out of curiosity, why  
13 wasn't that produced?

14 MR. KRISHNAMURTHY: Well, the reason is that in the 268 case  
15 or -- sorry, the 269 case, this case, the Court set a discovery cutoff.  
16 We inadvertently did not produce the second warrant until  
17 after the Defense had filed their motion. We produced it after  
18 they filed their motion, but before they filed the reply. So  
19 in deference to the Court's order in this case, we decided  
20 we're not relying on either warrant in this case.

21 *(Exhibit 7 - Page 12:21-25;13:1-12) [emphasis added].*

22 This begs the question, if the federal government is not relying on federal  
23 warrant #1 or federal warrant #2 for direct or derivative evidence, but only for  
24 impeachment, how exactly is the government going to prove its case against Mr.  
25 Wenger?

26 The government is left with only state warrant #1, the defects of which the  
27 government has also not contested -- which is notable. The government has tried to  
28 distance itself from state warrant #1 by repeatedly referencing that they did not  
rely upon its contents or its production in federal warrants #1 & #2. This argument



1 is undercut by the fact that state warrant #1 was attached as an exhibit to the  
2 federal warrants.

3 As discussed below, despite asserting that the federal warrants were not  
4 based upon the state warrant, the evidence from the state warrant was cited  
5 extensively throughout federal warrant #1 and federal warrant #2.

### 6 **B. Brief Synopsis of the Investigation**

7 In essence, this case has had the following timeline as discussed more  
8 extensively in the previously submitted law and motion by Defense Counsel. (*See*  
9 *Also Motion to Suppress* pages 1-4).

10 The Manly-Williams Misconduct reported to FBI Agent Zoback (hereafter  
11 “Zoback”) and Zoback writes the iCloud and Instagram warrant for Manly.  
12 Shortly thereafter Zoback received the “anonymous” letters. A handwriting  
13 expert, Beth Chrisman, has opined that the anonymous letters appear to have been  
14 written by Larry Wallace. (*Exhibit 4*).

15 Zoback then used these “anonymous” letters to conduct an unrestricted  
16 search into all involved officers’ iCloud accounts (including Harris and Amiri)  
17 and formally bring in the Contra Costa District Attorney’s Office (hereafter  
18 “CCDA”) via CCDA Investigator Larry Wallace. Zoback then seized the iCloud  
19 messages between Harris and Wenger from Harris’s iCloud and gave them to  
20 Wallace. Wallace also originally seized the use of force reports at issue, handed  
21 them off to Zoback, and 8 months later the same date and time stamped evidence  
22 was “reentered” into evidence by Special Agent Delgado Campos.

23 The FBI then used the iCloud data in the phone warrants to seize all the  
24 officers’ phones including Harris and Amiri’s phones. Prior to the return on the  
25 Phone data, Zoback found use of force iCloud messages in Amiri’s iCloud while  
26 searching ‘in furtherance of the steroid conspiracy’ which is directly from the  
27 “anonymous” letters, Zoback wrote a rollover warrant based on this iCloud data.

1 Zoback justified her search of the messages between Amiri and Wenger  
2 specifically due to Wallace having written a warrant for Wenger's phone for  
3 'steroids'.

4 The FBI then uses all of this to search virtually everything in both Harris  
5 and Amiri's phones. The FBI then tries to wash their hands of Wallace's warrant  
6 by rewriting a warrant (federal warrant #1) for Wenger's already seized phone  
7 data based on probable cause and evidence derived from Wallace's warrant, the  
8 "anonymous" letters, and what Wallace seized. There is no probable cause listed  
9 anywhere in the search of messages between Harris and Wenger, other than  
10 Wallace's defective warrant and the "anonymous" letters which appear to have  
11 been authored by Wallace himself. (*Exhibit 4*).

12 The FBI then issues federal warrant #2 to clean up federal warrant #1.  
13 Currently, the government is taking the position they will not rely upon evidence  
14 from either warrant except for "impeachment." (*Exhibit 7*, page 14:21-23).

### 15 **C. Wallace's False Statements in the State Warrant**

16 Wallace's previous false statements in the state warrant were thoroughly  
17 outlined by Defense Counsel in the previous motions. (See *Motion to Suppress*  
18 pages 4-5).

19 While none of these statements are new as they pertain to the July 24, 2023,  
20 warrant, a report regarding Wallace was disclosed by the government AFTER the  
21 law and motion deadline. (*Exhibit 2*; DCW-000598).

22 This report describes a conversation between Assistant United States  
23 Attorneys (AUSAs) Eric Cheng, Alethea Sargent, Ajay Krishnamurthy, as well as  
24 Federal Bureau of Investigation (FBI) Special Agent (SA) Thuy Zoback and  
25 CCDA Investigator Larry Wallace on May 23, 2024 – during the time when the  
26 government was aware defense counsel was prepared to file a Motion to Suppress.  
27 The below are exact quotes, verbatim from the government's own discovery:  
28

- Wallace stated that on March 3, 2022, he received a phone call from FBISA Krystal Martinelli regarding subscriber information for phone number 925-695-4468 (4468). SA Martinelli verbally informed Wallace that number 4468 belonged to Devon WENGER.
- Wallace said on March 2, 2022, he also received an email from SA Zoback that a cursory search revealed Devon WENGER and Kathaleen Kweder were the users of number 4468.
- Wallace said he had been speaking with SA Zoback in the days prior about submitting several subpoena requests for a list of phone numbers. Because of this, Wallace believed the information from SA Martinelli came from a subpoena, **although he never saw a subpoena. [emphasis added]**

*(Exhibit 2; DCW-00598; Exhibit 9)*

Even the very nexus between Wallace obtaining a number he associated with Wenger and a lawful search is tenuous. It is still unknown if Wallace obtained the subscriber information by lawful means. *(See Exhibit 9)*. Wallace stated that he received the information from the FBI, he assumed from a lawful source – a subpoena. By his own admission, Wallace was never told a subpoena existed and never saw that a subpoena existed.

Therefore, it seems that Wenger's very association to the number at issue was not lawfully obtained. That quite literally maybe where the roots of this poisonous tree were toiled.

#### **D. SA Kular's False Statements in the Warrant dated July 24, 2023**

##### **1. The Basis for the Probable Cause**

On the first page of the July 24, 2023, warrant, SA Kular states

*"I submit this affidavit in support of an application under Rule 41 of the Federal Rules of Criminal Procedure for a search warrant authorizing the search of the personal electronic device (cellular telephone) of Antioch Police Officer Devon WENGER, originally seized by the Contra Costa County District Attorney's Office pursuant to a state search warrant executed on*

1 *March 23, 2022 and forensically imaged as further described*  
 2 *in Attachment A (the “Target Data”), and to seize*  
 3 *evidence of crimes as described in more detail in Attachment B.”*

4 Attached to the July 24, 2023 warrant, were the previously executed  
 5 state warrant dated March 22, 2022 and the previously executed federal warrant  
 6 dated May 19, 2023. (*Exhibit 1*; DCW-000506).

7 FBI Special Agent Kular (hereafter “Kular”) made the following threshold  
 8 Statement at paragraph 9:

9 “In March 2022, search warrants from the person and  
 10 personal electronic devices for 15 subject officers were  
 11 executed, along with other associated locations. Eight  
 12 of those warrants were federal (including for the personal  
 13 electronic devices of current Antioch Police Department  
 14 Officer Morte AMIRI and former Antioch Police  
 15 Department Officer Daniel HARRIS), while an **additional**  
 16 **seven were written by state and local law enforcement.**”  
 17 (*Exhibit 1*; paragraph 9). [emphasis added]

18 At the beginning of his affidavit in paragraph 10 Kular goes on to state:

19 “During the course of this investigation, the personal cellular  
 20 telephone of DEVON WENGER, was seized **pursuant to a**  
 21 **state warrant executed on March 23, 2022, by the Contra**  
 22 **Costa District Attorney’s Office.** The state warrant is attached  
 23 as Exhibit 1. I am not relying on either the existence of the state  
 24 warrant or the results of any prior search to support probable  
 25 cause for this warrant”. Yet, in the very next paragraph  
 26 Kular states, “...based on evidence seized from the cellular  
 27 phones of AMIRI and HARRIS, there exists probable cause...”.

28 Kular is simultaneously stating that he did not rely upon the  
 state warrant while still relying upon the evidence seized by the  
 state – “the evidence seized from the cellular phones.”

(*Exhibit 1*; paragraph 10). [emphasis added]

Kular also states on the same warrant, on the very same page: “While  
 agents searched the personal cellular devices pursuant to the aforementioned  
 search warrants, including the devices of Amiri and Harris, agents observed

1 numerous conversations between Wenger, Amiri, and other officers about the use  
2 of force.” (*Exhibit 1; Paragraph 11*).

3 Despite, representing otherwise, Kular was relying on the results of prior  
4 searches, specifically, the prior search of Amiri’s Phone and the Prior Search of  
5 Harris’ Phone as the basis of his affidavit. The affidavit is largely comprised of  
6 text messages seized from both the phone of Amiri and the phone of Harris during  
7 prior searches. (*See Exhibit 1, paragraph 15 to 18, 21-23, 27-28*).

8 In fact, the probable cause utilized to search both phones specifically the  
9 messages between Amiri and Wenger as well as Harris and Wenger. In paragraph  
10 13, Kular states, “While agents searched the personal cellular devices **pursuant to**  
11 **the aforementioned search warrants**, including the devices of AMIRI and  
12 HARRIS, agents observed numerous conversations between WENGER, AMIRI,  
13 and other officers about the use of force.” The ‘agents’ that Kular refers to and  
14 relies on did in fact refer to Wallace’s ‘State Warrant’ as probable cause to justify  
15 their search(es) of the cellular phones which Kular states he knew. (*Exhibit 1,*  
16 *paragraph 13*) [emphasis added].

## 17 **2. Wenger, Despite Kular’s Representations, Never Admitted to Using** 18 **Steroids**

19 In paragraph 30 of the search warrant, Kular stated as follows “. ...Notably,  
20 by WENGER’s own admission he consumed steroids for a short period of time in  
21 the year 2021.” Wenger never stated he took steroids in 2021. Wenger in fact  
22 never testified he took anything in 2021. (*Exhibit 1, paragraph 30*).

23 In paragraph 28, Kular misstates the truth again, “On March 9, 2022,  
24 WENGER sent HARRIS another text asking if he can come by to pick up  
25 "Mahoney's stuff."” In fact, on that date there was no physical way that Wenger  
26 was near by to pick of “Mahoney’s stuff” on March 9, 2022, as Wenger was half a  
27 state away at the Joint Force Training Base in Los Alamitos. (*Exhibit 5*).

1 Wenger was at Los Alamitos as part of his duties as a member of the  
2 National Guard and was bunking in a hotel in downtown Long Beach. (*Exhibit 5*).  
3 Wenger was in Southern California for drilling exercises from March 7, 2022 until  
4 March 13, 2022 at Los Alamitos. (*Exhibit 5*). As part of his duties, Wenger was  
5 tasked with inventory of the arms room at his unit: Charlie Company 1st Battalion  
6 19th special forces group. (*Exhibit 5*).

7 Missing from SA Kular's affidavit is the following additional evidence:

- 8 - During Wenger's March 23, 2021 interview with the FBI, he explained,  
9 "so I looked [Testosterone Enanthate] up. [. . .] and I saw that it fell  
10 under, whatever, Title 21, as an exempted drug. And I was like, "Okay.  
11 Cool. I can take it. Like, that's awesome." So I did. [. . .] I didn't think it  
was illegal as it's presented [phonetic]."

12 Partial Transcript of Audio Transcription of March 23, 2022 Interview of Officer  
13 Devon Wenger, DCW-40000002, at DCW-4000022-23 (See *Motion to Suppress –*  
14 *Exhibit 7*).

15 Notably, the below fact was left out of the first federal warrant but included  
16 in the second federal warrant:

- 17  
18 - Testosterone Enanthate produced by certain manufacturers was exempt  
19 from the Controlled Substances Act (meaning one does not need a  
20 prescription to use it).

21 In the July 24, 2023, search warrant the government added in paragraphs  
22 30-33 to clean up its prior misrepresentations about the contents of the package.  
23 For example, the government now conceded that there is a list of **exempted**  
24 anabolic steroid products online that are not illegal. (*Exhibit 1, paragraph 31-32*).  
25 Of the list of exempted steroids, there is a lawful manufacturer in Fort Lauderdale,  
26 Florida. (*Exhibit 1, paragraph 32*). The package at issue was shipped from  
27 Florida.



**E. The Government Has Illegally Obtained Phone Records Outside the Time Periods Specified by the July 24, 2023 Warrant.**

The July 24, 2023, warrant requested “All records from the **Target Data** described in **Attachment A** from the time period of January 1, 2019 to March 23, 2022. . .” (*Exhibit 1*).

In its late discovery production, the government produced phone records to Defense counsel dated outside the time limitations set forth in the warrant (*Exhibit 6*, US-STM-000906). Notably, the phone records pertain to a phone number associated with Wenger and appear to not have been sanitized in any fashion. For example, the phone records contain phone calls between the number associated with Wenger and his previous attorneys, Rains Lucia Stern, PC. (*Exhibit 6*, US-STM-000906).

The government has not only obtained records outside the dates delineated by their warrant, but they have obtained privileged attorney/client communications as well.

The government willfully obtained the phone records outside the permissible time and asked for “no cells” as evidenced by the documentation from T-Mobile. (*Exhibit 6*, US-STM-000910). In the description of records produced, the T-Mobile declaration from their custodian of records states that the following was requested:

Records from - 9256954468 from 01/01/2019 to 07/31/2023

Call Details No Cells

Records from 9256954468 from 01/01/2019 to 07/31/2023

Subscriber Info

(*Exhibit 6*, US-STM-000910).

1 It is significant that the government, even as late as 2023, was trying to  
 2 confirm that the number the government associated with Wenger in fact belonged  
 3 to Wenger. However, as shown in *Exhibit 6*, the subscriber for that phone number  
 4 was not Devon Wenger. In fact, the subscriber information was in conflict with  
 5 what was written on the affidavit by Wallace in state search warrant #1. (*Exhibit 9*).  
 6 It is also significant that despite the time limitations set forth in the warrant, the  
 7 **government requested records from two years beyond the permissible dates.**

### 8 III. POINTS AND AUTHORITIES

9 The Fourth Amendment to the United States Constitution prohibits  
 10 unreasonable searches and seizures. Where a Fourth Amendment violation occurs  
 11 and evidence is derived from an unreasonable search or seizure, the remedy is the  
 12 exclusion of the evidence from trial. The “exclusionary rule reaches not only  
 13 primary evidence obtained as a direct result of an illegal search or seizure, but also  
 14 evidence later discovered and found to be derivative of an illegality or  
 15 ‘fruit of the poisonous tree.’” *Segura v. United States*, 468 U.S. 796, 804 (1984).

16 Regarding the state court warrant for seizure of a cellular phone associated  
 17 with a telephone number associated with Wenger, 1) the evidence obtained  
 18 therefrom must be suppressed because the Affidavit supporting that warrant  
 19 contained false statements that were either intentionally or recklessly made; and 2)  
 20 the warrant was overbroad and failed to comply with the California Electronic  
 21 Communications Privacy Act. (“CalECPA”). Accordingly, all evidence seized,  
 22 and derivative evidence obtained, from that cellular telephone phone as a result of  
 23 the defective March 22, 2022 search warrant – state warrant #1 must be  
 24 suppressed. Search warrant #1 was used as a basis to obtain the July 24, 2023  
 25 warrant – federal warrant #2.

26 Regarding the July 24, 2023 federal warrant, all evidence seized, and  
 27  
 28



1 derivative evidence obtained from that search of the same cellular phone must also  
 2 be suppressed because it is fruit of the tainted state court search warrant.  
 3 Independently, the Affidavit in support of the federal warrant also fails to  
 4 establish probable cause and is fatally overbroad.

5 Additionally, the phone records from 2022-2023 were obtained outside the  
 6 time periods set by the warrant and they must be suppressed along with all  
 7 derivative evidence. It is requested further by the Defense that the government  
 8 not be allowed to use the phone records from 2022-2023 for impeachment  
 9 purposes either.

10 **A. Evidence Obtained from the Execution of the State Court Warrant**  
 11 **Should Be Suppressed**

(See *Motion to Suppress* page 9).

12 **1. DAI Wallace Misrepresented Facts or Demonstrated Reckless**  
 13 **Disregard for the Truth Regarding the Target Phone.**

14 Accordingly, the evidence and any derivative evidence from the search of  
 15 Wenger's phone obtained because of the state court search warrant must be  
 16 suppressed. (See *Motion to Suppress* page 10: 9-28; to page 12:3).

17 **2. The State Court Search Warrant Failed to Comply with**  
 18 **CalECPA.**

19 The state court warrant for Wenger's phone violated CalECPA, and that is a  
 20 separate basis requiring suppression in this case. (See *Motion to Suppress* pages  
 21 12:6 to 17:20). Accordingly, the evidence and any derivative evidence from the  
 22 search of Wenger's phone obtained because of the state court search warrant must  
 23 be suppressed.

24 **B. Evidence Obtained from the Execution of the Federal Warrants**  
 25 **Should Be Suppressed.**

26 **1. Violations Associated with the State Court Warrant Tainted**  
 27 **Evidence Obtained from the Later Federal Warrants.**

1 On March 23, 2022, Wenger's phone was seized by the Contra Costa  
2 County District Attorney's Office pursuant to a defective warrant in violation of  
3 CalECPA.

4 More than a year after the state court warrant was executed, SA Kular  
5 obtained not one but two additional federal search warrants dated May 19, 2023,  
6 and July 24, 2023. (*Exhibit 2*) Both federal warrants relied extensively on the  
7 defective state warrant. (*Ex. 1 & Ex. 3*). The second federal warrant incorporated  
8 the first federal search warrant and first state warrant:

9 The Honorable Laurel Beeler, United States Magistrate Judge,  
10 Previously authorized a warrant for **Target Data** (3-23-mj-70708LB).  
11 That application and warrant are attached as Exhibit 2. This application  
12 includes additional information regarding "exempted" anabolic steroids set  
out in paragraphs 30-33 that were not included in the previous application.

13 (*Exhibit 1*).

14 Pursuant to the May 19, 2023, two additional downloads occurred: On May  
15 30, 2023, SA Kular collected a 128GB USB thumb drive containing a download  
16 of the subject phone from DAI Wallace and, in June 2023, FBI SA Martinelli and  
17 SI Holcombe completed a "partial reprocessing" of the "forensic image" of the  
18 phone. In so doing, California law was ignored.

19 Contra Costa Superior Court, the jurisdiction that issued the state court  
20 warrant for seizure of the cellular telephone and the records on it, should have  
21 been asked to issue any order regarding whether there was probable cause to  
22 believe that the information sought was relevant to an active investigation, or  
23 review, use, or disclosure as required by state or federal law. Instead, that court  
24 was not involved in the issuance of the second or third warrants.

25 **2. Evidence Laundering/Parallel Construction Occurred in This**  
26 **Case.**

27 Evidence laundering, also known as parallel construction, occurs when one  
28

1 police officer makes a constitutional mistake in gathering evidence and then  
 2 passes that evidence along to a second officer, who develops it further and then  
 3 delivers it to prosecutors for use in a criminal case. “The original constitutional  
 4 taint disappears in the wash.” *Kay L. Levine, Jenia I. Turner, and Ronald F.*  
 5 *Wright, Evidence Laundering in a Post-Herring World*, 106 *J. Crim. L. &*  
 6 *Criminology* (2016).

7 <https://scholarlycommons.law.northwestern.edu/jclc/vol106/iss4/1>

8 In other words, parallel construction is an attempt by law enforcement to  
 9 convert illegally obtained evidence into lawfully obtained evidence.

10 Here, as described above, the state court warrant was illegally obtained and  
 11 executed. The later federal warrants attempted to cure the preexisting  
 12 Constitutional defects. However, they could not.

13 The Target Data identified in the federal warrants was “fruit” of the illegal  
 14 state search. See *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (if the State  
 15 failed to prove a search and seizure was reasonable under Constitutional  
 16 standards, any evidence obtained either directly or indirectly must be excluded).

17 The remedy is suppression of all evidence obtained from the warrants.

### 18 **3. Uncorroborated Anonymous Tips**

19 “[U]nder appropriate circumstances, an anonymous tip can demonstrate  
 20 ‘sufficient indicia of reliability to provide reasonable suspicion to make [an]  
 21 investigatory stop.’” (quoting *Alabama v. White*, 496 U.S. 325, 327. (1990)). That  
 22 being said, “an anonymous tip alone seldom demonstrates the informant’s basis of  
 23 knowledge or veracity.” *Id.* (quoting *White* 496 U.S. at 329). To be reliable, an  
 24 anonymous tip must “accurately predict future behavior,” thereby  
 25 “demonstrate[ing] ‘a special familiarity with respondent’s affairs,’ which in turn  
 26 implie[s] that the tipster had ‘access to reliable information about that individual’s  
 27 illegal activities.’” *Id.* (quoting *White*, 496 U.S. at 332).

1 And even if the anonymous tip is reliable, it “will justify an investigative  
2 stop only if it [independently] creates reasonable suspicion that ‘criminal activity  
3 may be afoot.’” Id. at 1691 (quoting *Terry*, 392, U.S. at 30); see , e.g., *United*  
4 *States v. Lewis*, 672 F. 3d 232, 240 (3d Cir. 2012) (affirming finding that  
5 anonymous tip did not provide reasonable suspicion for vehicle stop because  
6 informant’s tip about firearms sin a white vehicle did not include any information  
7 about legali8ty of the firearms); *United States v. Johnson*, 620 F.3d 685, 693-94  
8 (6<sup>th</sup> Cir. 2010) (holding there was no reasonable suspicion for stop, in part,  
9 because anonymous tip gave no information reasonably indicating criminal  
10 activity).

11 The Defense is aware that this line of cases pertains to a pat down for  
12 reasonable suspicion of a crime. Analogously, if an uncorroborated anonymous tip  
13 is not enough legally to rise to the level of reasonable suspicion, then how can it  
14 be sufficient to rise to the higher standard of probable cause?

15 **4. The Federal Warrant Affidavit Failed to Establish Probable**  
16 **Cause.**

17 Kular attached the DAI Wallace-drafted state court search warrant as an  
18 exhibit to the federal search warrant Affidavit, but stated he was “not relying on  
19 either the existence of the state warrant or the results of any prior search to  
20 support probable cause for this warrant.” Instead, he attested that evidence seized  
21 from the cellular telephones of Amiri and Harris led him to believe there was  
22 probable cause to believe that evidence of the (new) Target Offenses existed in  
23 (old) Target Data. Even if there were new grounds to re-search the phone and its  
24 data, the evidence was already irreversibly tainted.

25 However, even if new warrants could cure the enumerated Constitutional  
26 defects, SA Kular failed to establish probable cause for additional searches. The  
27 determination that a warrant affidavit establishes probable cause is to be made  
28

1 based on the totality of the circumstances, and probable cause exists where the  
 2 sum of those circumstances reveals a “fair probability” that criminal activity has  
 3 occurred, and evidence will be found at a particular location. *Illinois v. Gates*, 462  
 4 U.S. 213, 238 (1983). At the very least, “more than bare suspicion” by the agent is  
 5 necessary to establish probable cause. *Brinegar v. United States*, 338 U.S. 160,  
 6 175-176 (1949) (“Probable cause exists where the facts and circumstances within  
 7 [the officers’] knowledge and of which they had reasonably trustworthy  
 8 information are sufficient in themselves to warrant a man of reasonable caution in  
 9 the belief that an offense has been or is being committed.”). Probable cause to  
 10 support the federal search warrant was not shown, based upon the following  
 11 deficient evidence.

12 **5. SA Kular Set Forth Erroneous Evidence that Wenger Engaged**  
 13 **in a Controlled Substance Conspiracy.**

14 Testosterone Cypionate and Enanthate are referred to various times in the  
 15 warrant. They are both legal and exempt from certain manufacturers under title 21  
 16 exemptions per the DEA. (*Exhibit 1*, paragraph 32). While the FBI relies on the  
 17 labels on the vials to determine the origin of the medication – the labels are  
 18 irrelevant because its not the label on the bottle that is exempt under Title 21, it’s  
 19 the contents within the bottle.

20 Wallace’s state warrant provides as follows regarding Harris’s package:  
 21 “On March 1, 2022, at approximately 1000 hours, you’re affiant  
 22 and SAs Templin, Armando Delgado-Campos, and Zoback met  
 23 Sukhdeep Singh, Postal Inspector, at the United States Postal  
 24 Inspection Service, 2501 Rydin Road, 2nd Floor, Richmond,  
 25 CA 94850. Postal Inspector Singh opened the above listed  
 26 package and located the following items: (1) package  
 27 of Anadrol-50 capsule anabolic steroids; (2) twelve  
 28 (12) bottles of Testosterone Cypionate C300, gray cap,  
 10 milligram, liquid anabolic steroids; (3) six (6)  
 bottles of Trenbolone A100, red cap, 10 milligram, liquid  
 anabolic steroids; and (4) three (3) bottles of Testosterone

1 P 100, purple cap, 10 milligram, liquid anabolic steroids....”

2 Kular states in paragraph 33 of the July 24, 2023, warrant that “As shown  
3 above, the label “Trueshot Pharmaceuticals” is affixed to the vials of testosterone  
4 enanthate seized in the USPS package identified by tracking number  
5 9405503699300174882173”. The Labels that Kular is referring to clearly say  
6 Testosterone Cypionate ‘TEST C300’ and have a grey cap. Even Wallace in his  
7 warrant specifically refers to this as: “...Testosterone Cypionate C300, gray  
8 cap...”

9 Not only does Kular falsely state the true contents of the package, he also  
10 omitted the fact that the package was addressed to an alias of Harris from sender:  
11 “Iron Rebel Industries in Florida”. The package was not addressed to Wenger  
12 whatsoever.

13 Additionally, as mentioned in further detail above, Testosterone Enanthate  
14 was not in above mentioned March 1st package. As it turns out, Zoback grouped  
15 the bottles together from other places and sent them to all be tested together to the  
16 DEA despite them being seized from different sources. (*Exhibit 8*). Kular then  
17 relied on this DEA test and omitted these facts by stating that the Enanthate was  
18 from Harris’s March 1st package when it in fact was not.

19 Kular then misrepresented the DEA testing of the ‘contents’ of Dan’s seized  
20 package in paragraph 29 of the warrant, “The contents of this package (depicted  
21 below), including several glass bottles with labels of various descriptions affixed  
22 to them, were sent to the Western Laboratory in Pleasanton, California for testing.  
23 A group of these bottles tested positive for Testosterone Enanthate...”. (*Exhibit*  
24 *1*).

25 According to the attached image, the FBI grouped all the suspected steroids  
26 they seized from Harris together and sent them to be tested together on April 3rd,  
27 2023, over a year and one month after they seized it all from Harris. (*Exhibit 8*).  
28



1 Kular is knowingly making the false statement that the items that tested positive  
 2 were all from Harris's March 1, 2022 package when in fact they are not, they are  
 3 everything that was seized suspected to be steroids from all of Harris's packages  
 4 and houses. (*Exhibit 8*).

5 SA Kular included the following in his Affidavit to support a finding of  
 6 probable cause that Wenger violated 21 U.S.C. 841 and 846:

7 - February 23, 2022 texts between Harris axnd purportedly Wenger that  
 8 discussed Wenger going over to Harris' to "pick up some shit."

9 - March 2023 texts between Harris and purportedly Wenger that discussed  
 10 Wenger going over to Harris' to pick up "Brandon's stuff" and  
 11 "Mahoney's stuff."

12 - March 9, 2022 texts between Harris and purportedly Wenger related to a  
 13 delayed package wherein a screen shot of the tracking number was  
 14 exchanged.

15 - SA Kular's summary regarding the FBI's March 1, 2022 interception of a  
 16 package with the same tracking number as the one in the screenshot Harris  
 17 sent to Wenger, and containing bottles that tested positive  
 18 for "Testosterone Enanthate."

19 - SA Kular's assertion that Testosterone Enanthate is a Schedule III  
 20 narcotic under Section 812 of the Controlled Substances Act.

21 - SA Kular's summary of a March 23, 2023 interview. There, he claimed  
 22 "Wenger indicated that in 2021 he contracted COVID-19 and as a result  
 23 was experiencing muscle weakness. WENGER explained that he did in  
 24 fact purchase steroids from HARRIS, approximately totaling 30cc of  
 25 testosterone. WENGER claimed he began to feel normal after a couple of  
 26 weeks and did not take any additional steroids after he finished the  
 27 quantity provided by HARRIS. Notably, by WENGER's own admission  
 28 he consumed steroids for a short period of time in the year 2021. [. . .]

First, during Wenger's March 23, 2022 interview with the FBI, he did not  
 say that he purchased "steroids from Harris, approximately 30cc of testosterone."  
 What Wenger did say was:

So I hit up my buddy Dan Harris. And I said, [. . .] Should I do hormone  
 replacement therapy or what? And he's like basically, "All you need is [. . .]  
 testosterone enanthate [sic] or whatever. That's what they use for TRT. And  
 so I looked it up. And I saw that under [. . .] whatever, Title 21, as an  
 exempted drug. And I was like "Okay. Cool. I can take it. Like, that's

1 awesome.” So I did. [. . .] I didn’t think it was illegal as it’s presented  
2 [phonetic]. [. . .] Like I said, I didn’t think – I thought it was exempt from  
3 everything.”

4 (*See Motion to Suppress Def. Ex. 6*, Transcript, at DCW-4000022-23 &  
5 DCW-4000024.

6 When SA Zoback again asked Wenger what Harris sold him, Wenger  
7 responded, “It was just – all I know is testosterone enanthate. Enanthate. Yeah  
8 [intelligible] – testosterone enanthate. [. . .] I got 30 cc’s for me, total. I took it  
9 all pretty fast. I felt normal again. That was it. Def. Ex. 7, Audio Recording, at  
10 18:30-39. SA Kular’s false information may be attributable to errors in the  
11 transcript of the recorded interview: Wenger said “enanthate” not “enanthate.”  
12 Also, Wenger said “testosterone enanthate” not “testosterone and enanthate.”  
13 (*See Motion to Suppress Def. Ex. 6 & Def. Ex. 7, Audio Recording, at 18:30-39.*

14 Regardless of the origin of the falsity, the Court was nonetheless misled to  
15 believe that Wenger admitted to buying “steroids,” namely “testosterone” from  
16 Harris.

17 Second, SA Kular’s assertion that Testosterone Enanthate is a Schedule III  
18 narcotic under Section 812 of the Controlled Substances Act, was simply  
19 incorrect. Testosterone Enanthate produced by certain manufacturers was exempt  
20 from the Controlled Substances Act (meaning one does not need a prescription to  
21 use it). See (*Motion to Suppress Def. Ex. 8*, DEA List of Exempt Anabolic  
22 Steroids, U.S. DOJ-DEA, Diversion Control Act, Drug and Chemical Evaluation  
23 Section. Exempt Anabolic Steroids (21 CFR § 1308.33 and 21 CFR § 1308.34),  
24 dated November  
25 5, 2020.

26 This is something a simple internet search would have revealed.  
27 Had SA Kular informed the federal Judge that 1) Wenger looked up Testosterone  
28 Enanthate and found it was an exempt medication, and 2) Testosterone Enanthate  
was, in fact, exempt, probable cause to believe that Wenger was involved in  
distribution of controlled substances would have been negated.

Interestingly, it seems that the government did some research into the issue  
of testosterone enanthate and cypionate between the drafting of federal search



warrant #1 and federal search warrant #2. (*Exhibit 1; paragraphs 30-33*). However, despite learning that some substances are exempt, the government appears to have failed to consider that Wenger’s testimony was truthful – he did not take steroids. He took a lawfully exempt medication during the period he was sick with COVID-19.

### **C. The Particularity Requirement**

The Fourth Amendment requires that search warrants particularly describe the place to be searched and the items to be seized. *Kentucky v. King*, 563 U.S. 456, 459 (2011) (“[A] warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity.”); *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (“The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one particularly describing the place to be searched and the persons or things to be seized.” (internal quotation marks omitted)).

The particularity requirement is especially important when a warrant authorizes the search of digitally stored information. *United States v. Christie*, 717 F.3d 1156, 1164 (10<sup>th</sup> Cir. 2013). Because digital devices can contain enormous amounts of information and relevant evidence can be stored in any location, the Fourth Amendment requires warrants for computer searches to “affirmatively limit the search to the evidence of specific...crimes or specific types of material.” *United States v. Otero*, 563 F.3d 1127, 1131-32 (10<sup>th</sup> Cir. 2009); *United States v. Rosa*, 626 F.3d 56, 62 (2d Cir. 2010) (finding that warrant lacked sufficient particularity for search of electronic media where it failed to link the items to be searched and seized to suspected criminal activity).

In this case, the second federal warrant lacked particularity as to the search of the electronic information stored in the phones. Instead, the warrant is overbroad and not narrowly tailored. In its failure to be particular, the warrant creates the kind of “dragnet” scenario that courts have sought to limit.

### **D. The Phone Records Exceeding the Limitations of the Warrant Should Be Suppressed**

1 If the “scope of the search exceeds that permitted by the terms of a validly  
 2 issued warrant. . . [the search and any] subsequent seizure [are] unconstitutional.”  
 3 *Horton v. California*, 496 U.S. 128, 140 (1990). As the Ninth Circuit recently  
 4 recognized, the nature of electronic data storage “creates a serious risk that every  
 5 warrant for electronic information will become, in effect, a general warrant,  
 6 rendering the Fourth Amendment irrelevant.” *United States v. Comprehensive*  
 7 *Drug Testing Inc.*, 621 F.3d 1162, 1176 (9<sup>th</sup> Cir. 2010)(en banc).

8 As evidenced by the Supreme Court’s decisions in *Riley v. California*, 134  
 9 S.Ct. 2474 (2014) (finding that police may not search cell phone incident to  
 10 arrest), the pendulum seems to be swinging towards greater privacy protections  
 11 for digital devices and the information therein. And in *Riley*, the Supreme Court  
 12 recognized that treating a cell phone as an ordinary “container” does not make a  
 13 lot of sense. (*Id.* at 2491) (Treating a cell phone as a container whose contents  
 14 may be searched incident to an arrest is a bit strained as an initial matter.”).

15 In this case, the government had a warrant before it that allowed them to  
 16 view phone records from the period of 2019 to 2021. Puzzlingly, the government  
 17 then requested phone records from T-Mobile from 2019 to 2023 – unquestionably  
 18 outside the time permitted by the warrant. Given that the government has  
 19 exceeded the scope of the warrant the phone records from T-Mobile must be  
 suppressed.

#### 20 **IV. A FRANKS’ HEARING IS NECESSARY**

21 A Franks hearing determines “the validity of the affidavit underlying a search  
 22 warrant.” *United States v. Kleinman*, 880 F.3d 1020, 1038 (9<sup>th</sup> Cir. 2017). To  
 23 obtain a Franks hearing, a defendant must make a substantial preliminary showing  
 24 that: (1) “the affiant officer intentionally or recklessly made false or misleading  
 25 statements or omissions in support of the warrant,” and (2) “the false or  
 26 misleading statement or omission was material, i.e., necessary to finding probable  
 27  
 28

1 cause.” *United States v. Perkins*, 850 F.3d 1109, 1116 (9th Cir. 2017) (citation,  
2 alteration, and internal quotation marks omitted).

3       Once the defendant makes that showing, to prevail at the subsequent  
4 hearing, he must establish both prongs by a preponderance of the evidence. See  
5 *United States v. Martinez-Garcia*, 397 F.3d 1205, 1214–15 (9th Cir. 2005).  
6 Deliberate or reckless omissions can constitute false statements for the purposes  
7 of a *Franks* inquiry. See *Franks v. Delaware*, 438 U.S. 154 (1978); *United States*  
8 *v. Perkins*, 850 F.3d 1109, 1119 (9th Cir. 2017) (concluding that officer omitted  
9 material information when proffering his conclusion about an image based on an  
10 incomplete and misleading description of the image). (See also *Franks’ Motion*  
11 filed previously).

12       In this case, affiants Wallace and Kular either intentionally or recklessly  
13 made statements/omissions that were necessary to find probable cause. Wallace  
14 and Kular made false statements in the state warrants as outlined above and, in the  
15 *Motion to Suppress and Motion for a Franks’ Hearing*. Kular omitted in his  
16 previous warrant, federal warrant #1, that some “steroids” are in fact exempt or in  
17 other words legal. This is underscored by Kular’s inclusion of this fact in federal  
18 warrant #2.

19       Kular also omitted from his warrant that Wenger never admitted to using  
20 steroids, but in fact only admitted to using an exempt medication that was legal.  
21 These statements were material in that they were relied upon by both the state and  
22 the federal government to obtain warrants they would not have otherwise been  
23 able to obtain. The Defense has met the requirements to demonstrate a sufficient  
24 prima facie case for a *Franks’ Hearing* as to state warrant #1, federal warrant #1  
25 and federal warrant #2. (See *Motion for Franks’ Hearing*).

26 \ \ \

27 \ \ \

1 **V. CONCLUSION**

2 For the reasons stated herein, all evidence obtained as a result of unlawful  
3 searches related to the July 24, 2023, warrant must be suppressed and a Franks'  
4 Hearing should be heard to discover the depth of the falsity put forth by both  
5 Wallace and Kular. It is therefore respectfully requested that the instant motion to  
6 suppress evidence and for a Franks hearing be granted.

7  
8  
9 DATED: August 13, 2024

SEKI, NISHIMURA & WATASE, PLC

10  
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